Supreme Court, U. S.
FILED
JAN 19 1976
MICHAEL RODAK, JR., CLERK

No. 64, Original

In the Supreme Court of the United States

OCTOBER TERM, 1975

THE STATE OF NEW HAMPSHIRE, Plaintiff

v.

THE STATE OF MAINE, Defendant

RESPONSE OF THE STATE OF MAINE TO NEW HAMPSHIRE'S EXCEPTIONS

Joseph E. Brennan
Attorney General

Donald G. Alexander
Assistant Attorney General

Edward F. Bradley, Jr.
Assistant Attorney General
State House
Augusta, Maine 04333

Counsel for Defendant
The State of Maine

Of Counsel
Robert J. Stolt
Assistant Attorney General

No. 64, Original

In the
Supreme Court of the United States

OCTOBER TERM, 1975

THE STATE OF NEW HAMPSHIRE, Plaintiff

v.

THE STATE OF MAINE, Defendant

RESPONSE OF THE STATE OF MAINE TO NEW HAMPSHIRE'S EXCEPTIONS

Joseph E. Brennan
Attorney General

Donald G. Alexander
Assistant Attorney General

Edward F. Bradley, Jr.
Assistant Attorney General
State House
Augusta, Maine 04333

Counsel for Defendant
The State of Maine

Of Counsel
Robert J. Stolt
Assistant Attorney General

INDEX

Citations:

	Page
Arkansas v. Tennessee, 246 U.S. 352	6
Georgia v. South Carolina, 257 U.S. 516, 522	2
Kansas v. Colorado, 185 U.S. 125, 144, 145, 147	5
New Jersey v. Deleware, 291 U.S. 352	6
Oklahoma v. Texas, 253 U.S. 465, 471	5
Texas v. Louisiana, Sup. Ct. No. 36 Orig., Report of Special Master	2, 6
United States v. Florida, Sup. Ct. No. 52 Orig., Report of Special Master	2
United States v. Louisiana, 394 U.S. 11, 60-66	3
United States v. Louisiana, Sup. Ct. No. 9 Orig., Report of Special Master	3
United States v. Texas, 162 U.S. 1	5
United States v. Texas, 339 U.S. 708, 715	5
Washington v. Oregon, 211 U.S. 127, 136	2

Treaties:

Convention on the Territorial Sea and Contiguous Zone, 15 U.S.T. 1606	
Article 4	3
Article 7	3
Article 11	3
Article 12	3

STATEMENT OF THE CASE

In April of 1974, Special Master Thomas Clark urged Maine and New Hampshire to resolve their lateral boundary dispute by agreement. In accordance with that request, counsel for Maine and New Hampshire met and agreed that the only principle which was appropriate for determining the location of the States' boundaries in Piscataqua River and Harbor and in Gosport Harbor was the middle of the main channel navigation or thalweg. Thalweg was the basis for the line submitted by the Motion for Entry of Judgment by Consent which Maine and New Hampshire subsequently filed. (Maine Brief in Support of Exceptions, Appendix p. 16, ¶ 3). In the report filed October 4, 1974, the Special Master rejected the boundary established in the consent decree he had encouraged the parties to enter, and recommended an entirely new boundary located in the geographic middle of the river. Both Maine and New Hampshire filed exceptions to the Master's report. Maine's exceptions were limited to a defense of the consent decree and the principle of thalweg which it had agreed upon with New Hampshire. New Hampshire did not object to the Master's rejection of the consent decree it had filed with Maine. Despite its written agreement that the middle of the channel of navigation established the lateral marine boundary, New Hampshire found the reasons for the Master's rejection of the principle "largely unanswerable," (New Hampshire's Brief in Support of Exceptions, p. 3) and accepted the Master's recommendation of geographic middle because the boundary created, by applying that concept, "is more favorable to it than that recommended in the proposed consent decree." (*Id.*, p. 3)

In its exceptions, New Hampshire objects to the Master's use of low tide elevations to determine the geographic middle of Piscataqua Harbor, the end point of the straight line portion of the proposed marine boundary. If New Hampshire's objection to the use of low tide elevations is accepted, the resulting boundary will deprive Maine to an even greater extent than the line proposed in the Master's report. (Appendix A) Throughout this litigation the State of Maine has abandoned its litigating posture to enter agreements in reliance upon assurances that the boundary dispute would thereby be finally resolved. Quite understandably, therefore, the State of Maine has been disturbed by the Master's rejection of the consent decree and the failure of the State of New Hampshire to defend it. In its exceptions, the State of Maine has presented

substantial legal support for this Court's acceptance of the consent decree,[1] and Maine will, hereafter, set out substantial legal arguments in opposition to New Hampshire's exceptions. Legal arguments aside, the State of Maine believes that New Hampshire has taken unjustifiable advantage of Maine's reliance on New Hampshire's representations that the litigation would be finally resolved by the consent decree. For this reason alone, equity demands that this Court reject the arguments which New Hampshire has presented in opposition to the consent decree the parties have represented as the final resolution of their marine boundary dispute.

1. New Hampshire's objections to the use of low tide elevations are erroneous.

The Special Master chose the low tide elevation on Whaleback Reef as a point to determine the geographic middle of Piscataqua River at the harbor mouth. (Report p. 42, n. 84) New Hampshire contends that the Master incorrectly used low tide elevations because the river must be measured from its banks. In support of this contention, New Hampshire cites several Supreme Court decisions. (New Hampshire's Brief, p. 5). None of these decisions cited by New Hampshire involves the measurement of geographic middle or contains more than an off-handed reference to the banks of the river. In the cases where it has used the geographic middle, the Supreme Court has measured from islands located in the riverbed. *Georgia v. South Carolina*, 257 U.S. 516, 522, (1922); *Washington v. Oregon*, 211 U.S. 127, 136 (1908). Most recently in *Texas v. Louisiana*, Sup. Ct. No. 36 Orig., the Special Master measured the geographic middle of the water boundary between Texas and Louisiana from islands in the north end of Sabine Lake. (Report of the Special Master, pp. 12 to 13). Consequently New Hampshire's contention that the geographic middle must be measured from the banks of the river is in direct conflict with the decisions which have actually addressed the question.

1 In its Brief in support of its exceptions, the State of Maine provided several examples of consent decree agreements which the Court has accepted. In his report filed in *Texas v. Louisiana*, Supreme Court #36 Original, the Special Master accepted the agreement which the states had reached concerning their river boundary and recommended that it be accepted by the Court. The Special Master wrote that "Concessions were made by each of the two states in order to reach amicable settlement of the boundary in this area" (Report p. 6, n. 3). In a report already adopted by this Court, the Special Master appointed in *United States v. Florida*, Supreme Court #52 Original, accepted an agreement the parties had reached regarding the method for locating Florida's offshore boundary (Report p. 53). See also *Texas v. Louisiana* (Report of the Special Master, p. 31).

New Hampshire also argues that the Special Master's use of low tide elevations is inconsistent with Articles 4, 7, 11 and 12 of the Convention of the Territorial Sea and Contiguous Zone, 15 U.S.T. 1606. (New Hampshire's Brief, pp. 13-24)

Article 7 permits construction of bay headlands to islands which are part of the mainland, *United States v. Louisiana*, 394 U.S. 11, 66 (1969). New Hampshire argues that the river midline should be measured from low tide elevations which meet the requirements for islands which are part of the mainland, but contends that the low tide elevations on Whaleback Reef do not satisfy these requirements. The Special Master in *United States v. Louisiana*, (Report, Supreme Court #9 Original) (1969), conducted lengthy and extensive hearings to determine whether Louisiana elevations were part of the mainland. No decision on the use of low tide elevations of Whaleback Reef should be made without similar factual development.

Article 4 permits straight base lines to be drawn only to low tide elevations on which a lighthouse or similar installations have been constructed. By analogy New Hampshire argues that this Article does not permit the Whaleback low tide elevations to be used to measure the geographic middle of the river. New Hampshire's position is clearly incorrect. Article 4 would permit straight base lines to be drawn to the low tide elevations on Whaleback Reef because it is undisputed that a lighthouse which is permanently above high water has been constructed there. New Hampshire denies the lighthouse justifies the application of Article 4 in this case because Whaleback Reef does not satisfy the requirements of Article 7 as an island part of the mainland. (New Hampshire's Brief, pp. 15-16) This objection is erroneous because low tide elevations which satisfy Article 4 qualify as base line points without having to qualify in addition as islands part of the mainland.

Article 11(1) provides that low tide elevations can be used to measure the territorial sea base line. New Hampshire argues that Article 12 which permits the use of low tide elevations to determine the geographic middle of the territorial sea of opposing states cannot be applied to determine the geographic middle of the internal waters of the river. New Hampshire reaches this conclusion because Article 11 low tide ele-

vations which Article 12 incorporates do not extend the limits of internal waters and therefore cannot be used in the determination of a river boundary dispute which involves the division of internal waters. (New Hampshire's Brief, p. 24) This objection is wholly irrelevant. The use of the provisions of the Convention on the Territorial Sea is based on the analogy of the banks of the river to the base line of the territorial sea or coastline. Articles 4, 7, 11 and 12 all establish principles for determining the coastline. If the coastline provisions in Article 4 and Article 7 are relevant to determine the geographic middle of the river, then the coastline provisions of Article 11 and 12 are also relevant. Thus, if the analogy to the Territorial Sea Convention is appropriate, it would be anomolous to exclude the only Convention provision which specifically provides for the determination of the geographic middle of a water boundary separating opposing sovereign states.

2. New Hampshire's objections to the use of low tide elevations require a full evidentiary hearing.

All New Hampshire's arguments in opposition to the Master's use of low tide elevations depend upon substantial factual assumptions. Thus, New Hampshire argues that the royal decree of 1740 does not delimit the middle of the river by reference to low tide elevations because contemporary maps do not depict low tide elevations the Master has used (Brief, pp. 4 to 5); that the banks of Piscataqua, not low tide elevations, must be used because the water between Whaleback Reef and Gerrish Island is the same as the water between the Reef and New Hampshire bank (Brief, pp. 6, 9), and because the practice has been to ignore low tide elevations in constructing median lines for river and offshore lateral boundaries (Brief, pp. 10 to 13, 24 to 28); that equity demands use of Wood Island because it results in proportionate distribution of lobsters and shellfish (Brief, p. 28); and that Whaleback Reef does not meet the requirements of any principle that would permit the use of low tide elevations to measure the geographic middle (Brief, pp. 7, 9). All this evidence has been submitted for the first time in New Hampshire's Brief in Support of its Exceptions to the Report of the Special Master. It is clear to Maine that New Hampshire's brief contains serious mistakes of fact. Several maps contemporaneous with the 1740 decree depict offshore elevations in the vicinity of Whaleback Reef. In fact, the Reef is named on several charts published within a reasonable period of the issuance of the decree.

Moreover, the river between Gerrish Island and Whaleback Reef is totally dissimilar from the river between the Reef and the New Hampshire shore. Commercial navigation inside Whaleback Reef is precluded because of the danger presented by shoal waters which exist there. Moreover, no significant fisheries are conducted by fishermen of either state landward of the harbor mouth line drawn by the Special Master. Finally, the practice of determining midlines in rivers and in offshore areas is at best contradictory. In several cases this Court has used islands, not the banks of the river to determine the river midline, supra, p. 3. In addition, the Special Master in this case has indicated several examples of the resolution of offshore boundary disputes by reference to low tide elevations. (Report p. 42, n. 84)

This Court cannot adopt a line which is different from the line proposed in the joint consent decree without permitting full development of the facts. To do otherwise would be to contradict the Court's normal liberal allowance for the full development of facts in controversies between sovereigns involving issues of high public importance. *United States v. Texas*, 162 U.S. 1 (1896); *Kansas v. Colorado*, 185 U.S. 125, 144, 145, 147 (1902); *Oklahoma v. Texas*, 253 U.S. 465, 471 (1920). In *United States v. Texas*, 339 U.S. 708 (1950), this Court held that a full hearing would be essential if there were disputes as to the meaning of documents and the answer was to be found in the contemporary construction, usage of international law and the like. (at p. 715) New Hampshire's allegations regarding low tide elevations create, for the first time, a dispute regarding the meaning of the 1740 decree which can be resolved only by contemporary construction and usage as well as international and domestic practice. Maine is entitled to a full hearing on all these issues before the Master's use of low tide elevations is rejected.

3. Equity requires an equal allocation of navigational access in the river.

New Hampshire concludes that the boundary determination must result in an equal division of significant river uses. (New Hampshire's Brief, p. 28) Thus since the federal navigational servitude allegedly guarantees equal navigational access, New Hampshire asserts that the only state interest affected by the division of the Piscataqua River is equal distribution of the living resources of the bed, i.e., lobsters and shellfish. (id. at p. 28) It is the position of the State of Maine that access to

navigation is the only significant state interest which will be affected by the boundary determination in the Piscataqua River. While jurisdiction over the fisheries is a significant concern outside the river mouth between Portsmouth and the Isles of Shoals, jurisdiction over navigation for pilotage and pollution control purposes is an extremely significant concern of each State inside the river.[2] The charts of the area establish that the area between the Reef and Gerrish Island is not deep enough to admit significant commercial navigation. In his report in *Texas v. Louisiana*, the Special Master held it would be "inequitable to locate the geographic middle of the Sabine River in an insignificant channel to the west of where the main volume of the Sabine waters flow." For the same reason, it would be inequitable to locate the geographic middle of the Piscataqua River by reference to Wood Island, depriving Maine of access to and jurisdiction over significant commercial navigation which occurs in the river.[3] In this case the only equitable allocation of navigational access and jurisdiction which can be obtained by locating the geographic middle of the Piscataqua River is obtained by measuring the midpoint from Whaleback Reef.

---

2 Despite its recognition of the navigational rights accruing to states as members of the union, this Court has constantly applied principles designed to insure unimpeded navigational access in state boundary disputes *Arkansas v. Tennessee*, 246 U.S. 352 (1918); *New Jersey v. Deleware*, 291 U.S. 352 (1934). Moreover, the independence of the colonies in 1740 when Maine's boundary was described made guarantees of navigational access extremely important.

3 The midpoint New Hampshire measured from Wood Island to Jaffray Point is not equi-distant from Odiorne's Point. Thus, even if it is demonstrated that low tide elevations at Whaleback Reef cannot determine the geographic middle of the river, New Hampshire has not given any explanation which justifies its failure to use the further point the Special Master used to locate the geographic middle of the river. (Report, p. 42, n. 84) If all three points are used, the equi-distant point does not intersect the harbor mouth and a discontinuous boundary results. This is the situation which the State of Maine warned in its Brief in Support of Exceptions (p. 4).

CONCLUSION

The midpoint claims now advanced by New Hampshire have not been subjected to the factfinding process of an adjudication. They are put forth without review of the Special Master or review by the other party, the State of Maine. This is not the appropriate proceeding in which to consider the line proposed by New Hampshire. The only considerations presented for decision here are whether the consent decree should be accepted or whether, alternatively, the Court should accept the Master's report. The State of Maine believes itself bound to its representations in the Motion for Entry of Judgment by Consent and therefore does not advocate any alternative line in the present proceedings.

The potential for further costly and time consuming litigation raised by New Hampshire's suggestion of an alternative line should be a clear indication to the Court of the necessity of adopting a firm policy in favor of consent agreements as a necessary and proper method of solving such disputes. That policy will clearly be affirmed by adoption of the consent decree presented by both parties in this matter. The policy will be seriously compromised and extensive litigation encouraged if the consent decree is rejected and the Court proceeds to consider New Hampshire's claims on their merits. Parties will be very reluctant to explore the likelihood of consent resolution if application for approval of the decree might result in an adjudication causing a result very different from that originally contemplated.

For the foregoing reasons, this Court should reject the Exceptions of the State of New Hampshire and enter the decree proposed by the States of Maine and New Hampshire.

Respectfully submitted,

Joseph E. Brennan
Attorney General

Donald G. Alexander
Assistant Attorney General

Edward F. Bradley, Jr.
Assistant Attorney General

APPENDIX A

Key

A-B	Line originally asserted by New Hampshire
G-D	Master's recommended line
C-E-F	Consent decree line
C-E-G-F	Most favorable line asserted by Maine in its answer